

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 823 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and sd/-

MR.JUSTICE H.L.GOKHALE sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
  2. To be referred to the Reporter or not? No
  3. Whether Their Lordships wish to see the fair copy of the judgement? No
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
  5. Whether it is to be circulated to the Civil Judge?  
No
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ISHWARLAL SOMCHAND DABGAR

Versus

STATE OF GUJARAT

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Appearance:

MR IM MUNSHI for Petitioner

Mr.Y.F.Mehta, L.A. for Respondent No. 1

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CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE H.L.GOKHALE

Date of decision: 17/01/97

ORAL JUDGEMENT(H.L.Gokhale,J.)

This is an appeal against the order dated  
29-7-1988 passed by the Additional City Sessions Judge,  
Ahmedabad in Sessions Case No.1 of 1988 convicting the

accused-appellant under Sec.302 Indian Penal Code and sentencing him R.I. for life.

2. The accused-appellant was charged for an incident which took place on 24-10-1987 at about 2.30 A.M. It was the prosecution case that he murdered one Mafatlal Atmaram, who was sleeping outside his house in the City area known as Sarangpur, on a cot. The prosecution examined Hiraben, widow of the deceased, his daughter Sakuntala and one relative Ishwarbhai and son of Mr. Ishwarbhai, Mahesh. The prosecution case is that Hiraben and Sakuntala were also sleeping outside the residence of the deceased and they have seen the occurrence of the offence. The other two witnesses are also staying in a nearby house and they have also been examined as witnesses to the incident. The accused is said to have been given fatal blows on the head of the deceased with an iron bar. The injuries, which were caused to the deceased are, on his head and the post mortem note at Exh.31 describes them graphically in para 17 thereof. The first injury is a C.L.W. of 7 cm x 3 cm. It is muscle deep over the left frontal region which is transversely placed about 4 cm. to the left midline and 5.5 cm. above the left eye brow. The second injury is a C.L.W. of 2.5 cm x 1 cm. It is also muscle deep and is placed over the left frontal region which is vertically placed, the lower end of which is 3 cms above the left eye brow and the wound is 4 cm. to the left from the mid line. The third injury is a C.L.W. of 3 cm x 5 cm. It is also muscle deep over the left frontal region transversely placed and the middle line end is 3.5 cm. from the midline and 2 cm. above left eye brow. The fourth injury is C.L.W. of 6 cm. x 1 cm. It is also muscle deep along the lateral margin of left eye.

3. The internal injuries corresponding to these injuries noted are as follows:

(1) Blood clots are present under the scalp covering the whole scalp except right parietal and temporal region.

(2) Fracture in the skull(as shown in a separate diagram.)

The Doctor, who has done the post mortem Dr.Vini Kapoor, has stated in her examination in chief that the internal injuries are corresponding to the external injuries. She has further stated that external injuries as well as internal injuries together were sufficient, in ordinary

course of nature, to cause death and that they were possible by a hard and blunt substance. She was shown the iron bar, muddamal article no.2, and has deposed that the external injuries can be possible by blow given by this type of instrument.

4. Hiraben and Shakuntala, widow and daughter respectively of the deceased, have graphically described the incident. They have stated that on the previous night at about 9.30 p.m. an altercation took place between the accused and his father on one hand, and the deceased on the other. It is admitted by Hiraben that the deceased had some doubt about her character, which he was harbouring for quite some time and that it was alleged that she had some illicit relationship with the father of the accused. She has described that on the fateful night, she along with her husband and daughter were sleeping outside the house in the open compound. She has also stated that the accused and his family members were also staying in the same compound outside their house. She further states, in para 4 of her deposition (Exh.11) that around 2.30 AM there was a big sound because of which she woke up. She saw that the accused was standing near the head of her husband (deceased) and he was beating him with an iron bar referred to as "dasta" by the witness. She further states that the accused gave 4 to 5 blows on the head of the deceased. She specifically and emphatically states that with her own eyes, she saw the accused hitting the deceased with the iron bar. Then she says, she shouted, as a result of which, her family members got up and then the accused ran away. Thereafter, she along with other relatives and neighbours went to the municipal hospital known as "Vadilal Sarabhai Hospital". The Doctor, who was available in the emergency ward, stated that the injured may not survive even for 2 minutes and as stated by the Doctor, in a very short time, the injured expired. The daughter of the deceased has also deposed in the same way, so also Ishwarbhai, a near relative staying in adjoining house. Only the 4th witness, Mahesh, has made a limited statement. He has stated that at about 2.30 in the night, he heard the shout of Vijay, the Son of the deceased that his father was being beaten by Ishwar and when he looked out, he saw that Ishwar was going from the cot of Mafatlal (deceased) and he had with him an iron bar. In the course of further investigation, the police discovered, the iron bar, as indicated by the accused and the discovery of the iron bar is proved by examining the panch witness Ayubkhan, Exh.16. First part of the panchnama was readover to Ayubkhan, after he made some initial statement and he confirmed that the statements

made in the panchnama are correct. In the first part of the panchnama, it has been recorded that the accused was asked his name and he replied that his name is Ishwarbhai Somchand. He also stated that he was staying in Ramula Shankarlal Chawl at Sarangpur. He further stated that he had kept the iron bar in his residence and that voluntarily, he would like to point out as to where it is.

5. After recording this statement and appreciating the other evidence and materials on record, the learned Additional Sessions Judge has come to the conclusion that the deceased was killed by the accused, that it was a homicidal death caused by the accused with the iron bar and that it amounted to an offence punishable under Sec.302 I.P.C. and accordingly, the accused has been convicted and sentenced to undergo life imprisonment.

6. Mr.Munshi, the learned Advocate appearing on behalf of the accused-appellant has contended that the name of Shakuntala, the daughter of the deceased and that of Ishwar, the neighbour, do not appear as witnesses to the incident in the earlier statement of Hiraben, the widow. He further stated that, as against that, names of one Balubhai and one Vijay very much appear in her statement as witness and that instead of examining Balubhai and Vijay, as eye witnesses, the prosecution has chosen to examine Shakuntala and Vijay and that they were selective in their approach. In this connection, what is to be noted is, that the entry made by the police constable (known as vardhi) is the first entry of the information received by the police regarding the murder of the deceased. That Entry is at Exh.21, page 92 of the paper book. It records that this Mafatlal Atmaram, the deceased, has been murdered at his residence in the area outside Sarangpur Darwaja at about 2.30 AM on 24-10-1987. It is true that in the statement given by Hiraben, which is recorded at about 7.30 AM, she has mentioned the names of Vijay and Balubhai as persons, who have seen the incident, but she has also stated that Shakuntala, her daughter, was staying with her. This earlier statement of Hiraben can, at best, be considered as a previous statement. As far as Balubhai is concerned, the accused himself, in his further statement, has deposed that after the incident, Balubhai came to attack the accused. Similarly, so far as Vijay is concerned, he is the Son of the deceased. It cannot be stated that Balubhai and Vijay are, in any way, much more independent than widow, Hiraben and daughter Shakuntala.

6. Mr.Munshi, the learned Advocate appearing for the

accused-appellant has placed reliance on the observations made by a Division Bench of this Court in Meghabhai Motibhai vs. State of Gujarat (1985-2 GLR 793) para 21. It has been emphasised therein that the Sessions Judges ought to see to it that if the prosecution is dropping any witnesses and if those witnesses are important witnesses, they ought to be examined. In the instant case, as stated above, it cannot be said that Vijay is a better witness than Hira or Shakuntala, nor can the same thing be said about Balu, who in fact, as per the statement of the accused himself, went to attack the accused after the incident took place.

7. The second decision relied upon by L.A. Mr. Mushi is 1977-2 Cr.L.J. 1566 (Ramlakhansingh vs. The State of Uttar Pradesh), wherein the Honourable Supreme Court has held that "non examination of neighbouring independent witnesses would be fatal". The case before the Supreme Court was that of decoity with murder. In our opinion, it will stand on a different footing and cannot be applicable to the facts of the present case.

8. In the instant case, it is not disputed that the deceased died immediately after the incident, after the deceased was taken to the hospital. So far as the presence of Hiraben and Shakuntala at the spot is concerned, that is admitted by the accused in his further statement at page 17 of the compilation. He has also admitted in his statement recorded at page 18 of the paper book, that he and his wife were also sleeping outside, in the same compound. Thus, the presence of the accused and these two eye witnesses at the scene of offence is not disputed. Under the circumstances, there is no reason to disbelieve either the statement of Hiraben or that of Shakuntala. On the contrary, it is alleged that Hiraben was having illicit relationship with the father of the accused. Though, she accepts that there was such an allegation against her, the correctness of the same is disputed. It is material to note that she describes the incident graphically. There is no reason for her to rope in somebody. It was suggested in the cross examination of some of the witnesses that the incident took place inside the house of the deceased and not in the open compound. As stated above, all the witnesses have categorically stated that the incident did take place in the open compound. Mr. Munshi has relied upon the initial report (vardhi) Exh.21, which states that the report received is that the deceased was murdered when he was sleeping at his house at Sarangpur. This vardhi is a cryptic recording of the complaint that is received. Moreover, in a city area and particularly

in a residential accommodation like chawl, where there may not be sufficient space inside, it is not unusual that persons will sleep outside their house and it can be described as "sleeping in the house".

9. Mr.Mushi tried to contend that discovery of the weapon used in the offence was hit by the provisions of Sec.27 of the Indian Evidence Act. As stated earlier, in the instant case, the panch witness Ayubkhan has deposed to the fact of discovery. First part of the panchnama has been read over and he has confirmed it, in his examination in chief. He has stated that the accused voluntarily desired to point out the weapon, which he subsequently pointed out. It cannot be, therefore, said that the discovery was, in any way, hit by Sec.27 of the Indian Evidence Act.

10. Lastly Mr.Munshi submitted that at the particular place, there was no sufficient light. So far as this submission is concerned, different suggestions have been made in the cross-examination of the witnesses as to where the electric polls were located. All the witnesses have clearly stated that there was sufficient light at the place where the incident took place.

11. For the reasons stated above, in our view, the learned Additional Sessions Judge has correctly come to the conclusion that the deceased was done to death by the accused and that thereby he has committed the offence punishable under Sec.302, IPC and we do not find any error in the judgment. Accordingly, the appeal stands dismissed.

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